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OCTOBER, 1972

## LEGAL RESTRAINTS ON DISSEMINATION OF INSTRUCTIONAL MATERIALS BY EDUCATIONAL COMMUNICATIONS SYSTEMS

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WASHINGTON UNIVERSITY

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LEGAL RESTRAINTS ON DISSEMINATION OF INSTRUCTIONAL MATERIALS

BY EDUCATIONAL COMMUNICATIONS SYSTEMS

Neil N. Bernstein

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## ABSTRACT

This report discusses the legal restraints on the use of electronic communications systems for dissemination of instructional materials in the United States. First the report examines the laws relating to public school elementary and secondary education, with primary emphasis on selection of courses of study and instructional materials. The second half contains an examination of the copyright laws, both the copyright law now in effect and the revision thereto currently pending before the Congress of the United States.

## I. Introduction

The law can be described as a system of principles or rules of conduct so established as to justify a prediction with reasonable certainty that they will be enforced by the courts if their authority is challenged. Thus, it is a collection of precepts that define and control the rights of each individual or institution and the obligations owed by that individual to others and to society as a whole. Behind each rule of law lies the sanction of the systematic application of the force of politically organized society, waiting to be utilized upon appropriate request.

The restraints of the law can affect behavior in several ways. First of all, they can prohibit certain modes of behavior altogether, either because of supposed anti-social consequences or because such behavior causes an impermissible infringement upon the legally-recognized rights of others. Second, the law can limit the amount of the behavior that can be engaged in, either by prohibiting it altogether to certain selected entities or by limiting the total amount of the activity that can be engaged in collectively. Such limitations can be enforced by sanctioning the activity only to those willing to bear a nonmoney burden, such as standing in line or applying for a license, or by sanctioning the activity only to those willing to pay a monetary burden imposed on the activity. Finally, the law can modify behavior by sanctioning it in certain forms and prohibiting it in all others.

The law restrains the dissemination of instructional materials by educational communications systems primarily by recognizing certain "rights" in third parties and requiring the disseminators to obtain the consent of the owners of those "rights" as a condition precedent to legally permissible dissemination. To the extent that the necessary consent can be obtained only upon the assumption of a monetary burden, it increases the cost of the system. Where the consent is contingent upon specific forms of operation, it limits the freedom of action of the disseminator. Moreover, the sheer necessity of obtaining consent imposes certain transactions costs upon the disseminator, which can hamper to some extent his structure or operation. Finally, where the consent cannot be obtained in any way open to the disseminator, the law forecloses him altogether from certain avenues of conduct.

This paper will examine two legal restraints deemed to be of greatest significance to instructional material dissemination. The first is the public school system, which develops and enhances the requirements for public elementary and secondary education. The second is the copyright system, which recognizes certain rights in the creators of original intellectual works. In the judgment of the author, the restraints imposed by these two systems of law are of primary concern for the dissemination in question.

## II. The Public School System

Any meaningful effort to utilize education communications systems for elementary and secondary education must necessarily involve the public schools. According to Denzau, non-public schools in 1970 enrolled only 5.6 million elementary and secondary students, slightly more than 10 percent of the total enrollment. Moreover, most of those students were enrolled<sup>1</sup> at the elementary level. Perhaps even more important is the fact that of the more than \$37,000,000 expended on elementary and secondary education in 1967-68, about \$33,000,000 was expended for<sup>2</sup> publicly controlled instruction. Thus, public education is by far the larger and more lucrative market to aim for.

In the United States, in contrast to most other nations, public education is controlled and regulated by the states, and not by the national government.

The United States national government does not directly control public education because it is a government of limited powers, with only the authority specifically delegated in the Constitution. Education is not specifically mentioned in the Constitution as a function of the national government. However, the Constitution does confer on Congress the power "to lay and collect Taxes, Duties, Imports and Excises, to pay the debts and provide for the common

defense and general Welfare of the United States."<sup>3</sup> The Supreme Court has interpreted this provision as implied authority for Congress to expend tax monies for any purpose directly related to "the general Welfare."<sup>4</sup> Public education is undoubtedly such a purpose.

On the basis of this implied authorization, the national government has exercised considerable influence in the development of the American public school system. Even before the Constitution was adopted, Congress enacted the Ordinances of 1785 and 1787, providing for land grants to the states from the public domain for the "maintenance of public schools," pursuant to a policy declaration that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." Some of the more important subsequent federal programs have been the 1917 Vocational Education Act, the 1946 National School Lunch Act and the 1958 National Defense Education Act. By setting forth specific criteria for federal fund eligibility, the national government has used these programs to exert a considerable influence over the policies adopted by the states in their public schools.

The power over education is considered to be an essential attribute of each state's sovereignty, as broad as its power to tax, establish and maintain a system of courts, and exercise the police power. The state's authority over education is not a distributive

one to be exercised by local government, but a central power residing in the legislature of the state. The legislature has the unrestricted right to prescribe the methods of education, limited only by express constitutional provisions.

State legislatures can administer their programs themselves, or they may delegate the administration to others. In the field of education, most legislatures have chosen the latter course. Although the patterns vary widely in detail, most states have a state board of education, which acts as the policy making body, and a state department of education, which acts as the main administrative and supervisory body. The department of education can act as regulator, advisor, coordinator and/or researcher for the public school system.

Finally, each state has local school boards, which are the administrative agencies assigned the task of actually running the schools. These boards are agencies of the state and not of any local governmental entities. They are quasi-municipal corporations, possessing only those powers expressly granted them by state constitution and statutes, and those powers which are necessarily implied from the express powers. Some of these powers are discretionary, requiring subjective judgment that can only be exercised by the board as a board. Other are ministerial, requiring no judgment and can be delegated to individual board members or subordinate employees. The creation, alteration and abolition of public school districts is, in the main, controlled by the legislature and protected by the courts.



The operators of an educational communications system should pay primary attention to two legal parameters of public school systems. The first is the specific statutory provisions relating to the question of what can or must be taught in the public schools. The second is the limitations on the materials that can be used to teach those or any other public school subjects.

So far as prescribing courses of study is concerned, it is firmly established in this country that the power of course selection to be pursued in the public schools rests with the legislature, and its mandate is final and binding. The legislature is deemed to possess the power to require that studies essential to good citizenship be taught and that nothing be taught which is manifestly inimical to the public welfare. The courts have consistently held that the legislative mandates must be followed regardless of parental wishes. The only possible grounds for attack available to dissatisfied parents are that a particular legislative direction violates the individual liberties protected by the United States Constitution and its amendments or violates provisions or restrictions which may be found in a particular state constitution.

A few states have specific constitutional provisions concerning what must be taught. The most common of these are provisions specifically barring sectarian education in the public schools. However, constitutional provisions can and do go much further than this--Utah, for example, has a constitutional requirement that the metric system be taught.<sup>5</sup>

Most of the state curricular prescriptions are found in statutes. Teaching the constitution of the United States is required by statute in almost all states. Provisions requiring the teaching of the appropriate state constitution are almost as common. Many states also require the teaching of national and state history in elementary or secondary schools. Other common curricular mandates include instruction in such areas as arithmetic, spelling, effects of alcohol and narcotics, conservation, health, safety and physical training.

Many states have statutes which go beyond the establishment of certain fields of knowledge that must be taught and also contain provisions relating to ideas and attitudes. The most common are statutes requiring the teaching of "patriotism" and "good citizenship." Nebraska goes further and requires teaching of "the benefits and advantages of our form of government and the dangers and fallacies of Nazism,

Communism and similar ideologies."<sup>6</sup> Florida probably goes the farthest of all in requiring teachers to inculcate "principles of truth, honesty and patriotism" as well as "the practice of every Christian virtue."<sup>7</sup>

On the negative side, a state has the power to prohibit any teachings which can be shown to be inimical to the health, safety or morals of the people of the state. However, the Supreme Court of the United States has held that the right to teach educationally valid material (such as a foreign language) is a constitutionally-protected right of teachers, as is the right of pupils to acquire such knowledge and the right of parents to control the education of their young. These rights can be interfered with by the legislature only upon a showing that the acquisition by a child of such knowledge is clearly "injurious to the health, morals, or understanding of the ordinary child."<sup>8</sup>

### III. Control of Textbooks and Other Educational Materials

Textbook selection authority also reflects the general pattern of ultimate control at the state level. Whether there is an express constitutional provision or not, the courts agree that the right to select public school textbooks is vested primarily in the legislature, and the legislature's power is

full and complete. Pursuant to that power, the legislatures may constitutionally prohibit the purchase of textbooks not on specified lists, grant a publisher the right to supply the needs of a school for a stated period, limit the prices to be paid for textbooks or require publishers to establish a central depository in the state at the publishers' expense for distribution of books. The legislatures may also delegate the power of textbook selection to a state board or commission or to local authorities of the school district or municipality. In the absence of proof of malevolent intent, the courts will not interfere with the exercise of these powers by the appropriate authority. The legislatures have discretion to authorize the furnishing of textbooks to pupils free of charge or to require payment for same from those pupils whose families can afford to pay. However, a state may not make the purchase or rental of a textbook a condition precedent for admission to the schools.

The states are approximately evenly divided on the manner in which the power of textbook selection is actually exercised. In about half of the states, textbook selection power is held by either the state board of education or a special state textbook commission made up of persons connected professionally with public education. In the other states,

the textbook selection authority is placed by statute directly in the hands of the local school boards. A few states, e.g. Colorado and Utah, go so far as to have constitutional prohibitions against textbook selection by the legislature or state board of education.<sup>9</sup>

The above description probably overstates the actual extent of state control over educational material selection, for several reasons. In the first place, the state boards will almost never prescribe a single textbook that must be used in all classes on a particular subject throughout the state; instead, the state customarily establishes a multiple list of books from which each local board can make its selection. Second, the state boards will select textbooks only for the courses that must be offered in all public schools throughout the state. Local school boards select the textbooks for the courses they decide locally to offer. Finally, the state will select only the "textbooks" for the particular designated courses; local boards have the power to supplement those textbooks with other books or materials of their own choice. So long as a state-approved book is adopted and used as the main work in the course, supplementary additions by local boards are permissible.

These legal parameters present the operators of an educational communications system with crucial policy decisions. The operator can minimize his legal risks by confining his activities to the provision of supplementary materials for use in courses other than the basic "reading, writing, arithmetic, government and health" courses. Such a system would carry materials that local boards are free to acquire without the necessity for obtaining prior state approval. On the other hand, this strategy would limit the operator's market, because by definition he would be providing material for courses that some local boards will offer and others will not. More seriously, the financial resources available to the typical board to obtain supplementary materials is usually quite limited and subject to competing demands for smaller classes, newer equipment, and the like. Such money is in short supply and highly coveted. Whether enough could be allocated to support a large-scale communications satellite-based system so as to make such a system economically viable is very questionable, given the current scarcity of resources.

On the other hand, the operator could decide to provide a basic "electronic textbook" for a course that is required almost everywhere, such as "Understanding the National Constitution." This would afford him the maximum possible

market, because the course is taught almost everywhere and basic textbooks have a high priority in the budget allocation process. However, such an offering would have to be approved by 25 state boards before it could be used in those respective states. Gaining such approval could require a long and bitter political struggle, especially if an influential group such as the teachers viewed the system as a potential threat to job security. The bitter feelings that might be aroused could make it difficult to get the operator's materials actually adopted, even after a successful fight to have them placed on the state's approved list.

Probably the most attractive strategy would be one similar to the policy advocated by Barnett and Denzau.<sup>10</sup> An initial introductory period would be contemplated, during which the system would be used only for peripheral classroom tasks and the effort would be concentrated on gaining teacher approval of the systems. Operation during this period might not be compensatory. After this approval was obtained, an effort could be made to expand the system into a major classroom tool. State approval could be deferred until this later date, when it could be obtained more easily and without a residue of bad feelings. Ideally, federal

government support could be obtained for the first phase, in much the same way as the "performance contract" test was funded by OEO.

#### IV. Copyright

Copyright has been defined as "the exclusive right secured by law to an author or his assigns to multiply and dispose of copies of an intellectual or artistic creation whether by mechanical reproduction or public presentation." <sup>11</sup> Its doctrinal origins can be traced back to the Roman Empire, when important manuscript publishers paid authors for the right to duplicate or sell their works. Trade usage led others to honor a publisher's exclusive rights in a work transferred to him.

In Anglo-American law, copyright protection is traced to the chartering of the Stationer's Company in 1556 as a part of the efforts of the Crown to suppress the religious ideas of the Protestant Reformation. The members of the company were granted by Royal Patent the exclusive right to print books in the British Isles. In return, the stationers agreed to print only books approved by the Crown and to search out and destroy all illicit presses and unlawful



books. The scope of this first copyright was the right to publish and no more--literally a right to copy. It was a right to which a given work was subject and not the ownership of the work itself.

This system ended with the collapse of censorship at the end of the Seventeenth Century. In order to protect the publishing industry from the possible chaos of unrestricted competition, the stationers persuaded Parliament to pass the Statute of Anne which provided for two different kinds of copyrights: The stationers' copyright existing in all books already published was extended for twenty-one years; in addition, a new statutory copyright was set up for all books subsequently published. This copyright was limited to a term of fourteen years, with a similar renewal term only in the author. The right granted was "the sole liberty of printing and reprinting" a book, which was infringed by anyone who should "print, reprint or import" the book without consent. Offenders were to forfeit their books and also to forfeit a penny a sheet, one moiety to the Queen and the other to the person suing for same. To prevent punishing inadvertent offenders, the statute provided that forfeiture and penalty could not be exacted with respect to new books unless the title to the copy was entered, before publication, in the register book at the Hall of the Stationer's Company.

Because the Statute of Anne vested the power to obtain new copyrights and copyright renewals in authors rather than publishers, copyright came to be looked upon as a property right of the owner. By a process of judicial expansion, copyright came to be the author's sole property right, embracing his entire interest in a published work. It protected the author's right not only to publish a work, but to alter it, change it any way he chooses, prepare derivative works, and to prevent others from doing likewise.

The colonists brought the English law of copyright to this country as a part of their common law heritage. By the time of the Constitutional Convention, all but one of the original states had passed copyright laws. However, at the Convention, the drafters felt that copyright and patent could not be satisfactorily protected on a state-by-state basis. Therefore, they inserted into the Constitution Article 1, section 8, clause 8, which provides:

"The Congress shall have the Power . . . To promote the Progress of Science and useful Arts; by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The first national copyright act was passed by Congress and approved by President Washington on May 31, 1790. The act covered only books, maps and charts and resembled the Statute of Anne in all but formal details. American copyright law was revised periodically throughout the nineteenth century. Generally, these modifications involved expanding the rights of the copyright owner, both in terms of expanding the categories of works entitled to copyright protection and in expanding the substantive rights granted exclusively to the copyright owner.

The currently effective copyright law is the Copyright Act of 1909.<sup>12</sup> The Act followed a request to Congress by President Taft in December, 1905 for a complete revision of the copyright laws, which were then scattered in 12 different statutes. In response to that message, various conferences involving all interested persons were held in 1905 and 1906. Legislation was introduced in 1906 and 1907 but no action was taken. Finally, in 1908 legislation satisfactory to all interested parties was drafted and enacted on March 4, 1909.

The Act first describes the subject matter of copyright as "all the writings of an author" and lists thirteen categories of works which are generally considered to encompass the

entire scope of "all writings"--books, periodicals, lectures, dramatic and musical compositions, maps, works of art, reproduction of works of art, scientific drawings, photographs and motion pictures. The author of a copyrightable work upon compliance with certain statutory requirements is given a list of specified exclusive rights--the right to publish, translate, make other versions, dramatize, arrange, complete, deliver in public, perform and record. These rights are granted for an initial term of 28 years, with a right to renew for an additional 28 year term.

The use of copyrighted works in an educational classroom is not in itself a violation of the exclusive rights of the copyright owner. However, if a teacher attempts to reproduce all or part of a copyrighted work without the prior consent of the copyright owner, she may thereby violate the owner's exclusive right to "copy" the work.

There is under present law a judicially created exception to the owner's exclusive right to copy, known as the doctrine of "fair use." This doctrine acknowledges a limited right of others to copy portions of copyrighted works under appropriate circumstances. Neither the limits of the doctrine nor its logical justification is very clear.

Courts have tried to set out a series of criteria that presumably must be examined to determine if a particular instance of copying is a "fair use." For example, in Carr v. National Capital Press, 71 F.2d 220 (D.C. Cir. 1934), the court stated it needed to examine the following factors:

"The value of the part appropriated; its relative value to each of the works in controversy; the purposes it serves in each; how far the copied matter will tend to supersede the original or interfere with its sale; and other considerations."

The clearest example of a "fair use" is the reproduction of portions of a copyrighted book in a review of that book. Technically, this is an infringement of the author's exclusive right to copy all or a portion of his work. On the other hand, the copying involved is something that would not be objectionable to a reasonable copyright owner. The appropriation does not appear to do any damage to the commercial value of his rights. In fact, such reviews probably enhance its commercial value.

Similarly it has always been accepted that the copying of a work by an educator for use in connection with his research or educational duties was a permissible "fair use."

The copiers were not attempting to derive personal commercial benefit from the labor of another. Moreover, the advancement of scholarly research and education is a goal highly favored in this society. Finally, it was felt that such appropriation would have no appreciable adverse effect on the market for the copyrighted work itself or any of the protected rights of the copyright owner.

However, with the advent of cheap and efficient photocopying machines, this practice has come under new criticism from copyright holders, commonly the book publishers. The market for many textbooks and other instructional materials is now primarily confined to the sale of multiple copies to schools and school systems. If schools are permitted to buy individual copies and make unlimited multiple photocopies, that entire market can be economically destroyed. Consequently, in recent times, publishers have renewed their efforts to confine the boundaries of the "fair use" exception in the scholarly context.

The February 1972 Court of Claims case of The Williams and Wilkins Co. v. United States vividly illustrates the problem. That case was an attack on the dissemination practices of the National Institute of Health and National Library of Medicine.

These libraries typically subscribed to two copies of more than 3,000 medical journals. NIH on demand would photocopy any article in any journal in its collection for any researcher on its staff. NLM on request would photocopy any article in its collection and supply it on a no-return basis to any library or research-oriented institution participating in its "inter-library loan" program.

The plaintiff, a publisher of medical journals and books, successfully attacked these practices as an infringement of its copyrights. The court held that "fair use" did not apply to these practices, for the following reasons:

"The photocopies are exact duplicates of the original articles; are intended to be substitute for, and serve the same purpose as, the original article; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitutes plaintiff's market."

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It seems clear that the same reasoning would invalidate the multiple copying of a copyrighted work by a teacher for distribution to her students. The copying would be a direct substitute for the purchase by school authorities or the students themselves of copies for each individual student.

Because this is the main market of the educational publisher, his market would be clearly diminished. This decision is not final, but if it is sustained, its implications are enormous.

A comprehensive educational communications system would raise many other complex copyright problems. For example, the manager of such a system would need to convert a vast quantity of existing instructional material into suitable form and store it in a centralized location, such as a computer memory bank. Some of that material would be transmitted and used extensively in the system; some of it might never be used at all. At the outset, the extent of use for each item might not be even roughly predictable. For maximum utility, the materials should be readily and speedily available to the ultimate users for both evaluation and use. Each user (primarily teachers) should be able to preview material, edit it, display it as often and at whatever time suits his convenience and educational needs. The material should be reproducible in hard copy form for distribution to students and subsequent reference.

Each of these steps can impinge upon the legal rights of the copyright holder. Preparing the work for computer insertion may involve its manual reproduction in punched cards,



magnetic tapes or other machine readable form, or its electronic insertion by means of an optical scanner. This preparation may impinge upon several of the copyright owner's exclusive rights.

First of all, it could be argued that the preparation is a violation of the owner's exclusive right to "translate the copyrighted work into other languages or dialects, or make any other version thereof." There are no known cases construing this language to include reproduction in machine readable form. However, the courts have extended the translation right beyond conventional translation into foreign languages.

Second, such reproduction might violate the owner's exclusive right "to make . . . any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or be reproduced." The legislative history of this section suggests Congress intended it to apply only to the recording of a work that has been publicly performed for profit, such as a musical show presentation. However, the language of the section is much broader than that and, if applied literally, would appear to cover the making of punched cards, tapes and the like.

Finally, machine form translation can be a violation of the proprietor exclusive right to "copy". The definitive case on the question of what is a "copy" is White-Smith v. Apollo, 209 U.S. 1 (1908). That case held that the reproduction of a song on a perforated piano roll was not a "copy" of the sheet music of the composition. The reasons given by the court for its decision were two: First, the roll was not a duplicate of the sheet music because it never reproduced the written notes in any form. Second, the piano roll was not visually perceivable to anyone but a person of extraordinary patience and skill. Computer programs have this second characteristic, in that they are not normally readable by the naked eye. However, they differ from piano rolls in the first characteristic--they can be used to reproduce the original.

Much the same problems arise with respect to storing the material in a computer and transmitting it to distant locations. In each case, new electronic signals are produced that are manifestations of the original work. Copyright liability is a real possibility. So far as output is concerned, the law seems to be a little clearer. Anytime a work is reproduced in a tangible form, the work has been "copied".

Even if a hard copy is not made but the work is only displayed on a screen or scope, the work may still be copied. The key cases on this problem concern whether projecting a copyrighted motion picture film onto a screen constitutes "copying". The two courts that have considered the question came to opposite conclusions: The U.S. District Court for the District of Maryland held projection was not copying, Tiffany Production, Inc. v. Dewing 50 F.2d 911 (1931), but the U.S. Court of Appeals for the Second Circuit held it was, Patterson v. Century Production, Inc., 93 F.2d 489 (1937). Until the Supreme Court definitively rules on the question, no one knows what the correct answer is.

V. Copyright Revision: Implications for Electronic Dissemination

Efforts have been underway for some time to replace the 1909 Copyright Act with a more modern statute. In 1955, Congress directed the Copyright Office of the Library of Congress to begin a comprehensive re-examination of the copyright law with a view to its general revision. The office prepared a number of studies that were published from 1955 through 1959. In 1961, the Register of Copyright issued a report containing his conclusions and certain "tentative recom-

mendations" for general law revision. He then convened a series of meetings in which representatives of all interested groups had an opportunity to thrash out the specific problems. In 1963, a Preliminary Draft was prepared and circulated for further discussion. A modified bill was introduced in 1964 in the 88th Congress for further dissemination and discussion. In the 89th Congress, a revision bill was introduced that managed only to receive approval from the House Judiciary Committee in 1966. In the 90th Congress, another revision bill was introduced and actually passed the House of Representatives in 1967. However, the Senate Judiciary Subcommittee refused to report the bill out, because of conflict over the question of copyright liability for the community antenna television industry. Bills were also introduced in the 91st and 92nd Congress, but no action was taken in either session. At this moment, copyright revision is probably a dead duck.

In spite of this lack of present activity on a copyright bill, it is instructive to examine the pending legislation to see how the problems described above would be affected by its passage. For this purpose, discussion will be focused on S. 644 (92nd Cong., 1st Sess. 1971), the most current bill available.

The general approach of the pending bill is to substantially broaden the rights of the copyright owner, subject to specific

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exceptions in designated situations. Thus, the duration of the copyright is extended by section 302 from the present maximum term of 56 years to the life of the creator plus 50 years. For that entire period, the copyright owner is given the following exclusive rights by section 106:

- "(1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies of phonorecords of the copyrighted work to the public . . .;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly."

There can be little doubt that most of the operations of educational communication systems discussed above affect these rights. Classroom teacher duplication for class distribution is "reproducing the copyrighted work in copies." In fact, if the teacher ~~shows~~ it to the class on a screen by slide or overhead projector, she is "displaying it publicly", another of the protected exclusive rights. So far as information storage and retrieval are concerned, it seems clear that transferring information from printed into machine readable form is either "copying" or preparation of a "derivative work" and hence an infringement. Many of the manipulations and

analyses that a computer can do could also be considered "derivative works." And clearly any form of output--print-out, visual or by voice--of copyrighted material is an infringement. The distribution of the work by a communications system is also a "performance or display" of the work and thus within the exclusive rights of the copyright owner. Finally, the ultimate use of the material transmitted, whether it be displayed, copied, edited, projected, or restored, is another infringement.

Thus, if copyrighted material can be utilized in any way in an educational communication system without the prior consent of the copyright owner it can be only by virtue of one or more of the specific exceptions contained in other sections of the proposed bill. These exceptions will now be examined.

Section 107 of the bill specifically permits the "fair use" of a copyrighted work, for purposes such as teaching or research. However, the bill does not draw any line between "fair use" and copyright infringement. Instead, it merely directs consideration of the following factors:

- "(1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

In other words, the drafters of the bill have abandoned any effort to produce a precise guide to the limits of permissible fair use. Instead, users are forced to rely on "fair use" at their peril, with possible infringement liability and the risk of expensive, time-consuming litigation.

In addition, the bill contains a number of specific exceptions for educational users. First, section 110 provides that a copyrighted work can be performed or displayed in a classroom "in the course of face-to-face teaching activities of a non-profit educational institution." This exception would apparently not apply to copying of a work, only to its performance or display. Moreover, it would seem to require that the teacher be present in the room every time a student views the work.

Second, section 11 of the bill permits the performance or display of a copyrighted work by means of an educational system. However, to come within the protection of this particular exception, three criteria must all be met. First, the performance or display must be "a regular part of the systematic instructional activities" of a school. Second, the performance or display must be "directly related and of material assistance to the teaching content of the transmission". Third, the transmission must be primarily for reception in classrooms or for people with disabilities that prevent their attendance in classrooms.

Finally, educational broadcasters are permitted to make no more than twelve copies of any transmitted work. However, these copies cannot be recopied. Further, all but one of them must be destroyed within five years after the program was first transmitted to the public.

These are the extent of the educational exception to the broad rights granted to copyright owners. It seems clear that none of them will provide comprehensive protection for an educational communication system.

Therefore such a system cannot utilize copyrighted materials without the consent of the copyright owner. This will put three serious limitations on the operation of such a system. First, the owner will customarily extract a fee for his consent, thereby increasing the costs of the educational system. Second, finding the owner of the rights (which are freely transferrable) can involve great expense and time, which means high transaction costs. Finally, nothing requires the copyright owner to give his consent at any price. In such a case, public dissemination and education can be seriously hampered.



### Conclusion

No designer or operator of an educational communications system can hope to develop a viable system without a comprehensive working knowledge and appreciation for the legal restraints on the dissemination of instructional materials.

The laws relating to public school systems will have a significant influence in his selection of materials. He must decide whether to emphasize subjects that are mandated almost universally or those that are offered only at the discretion of local school boards. He must also decide whether to offer comprehensive basic "electronic textbooks" or supplementary materials only. Decisions on both these questions will depend upon whether he is more concerned about minimizing his political difficulties or reaching the largest possible market. This paper recommends a strategy of utilizing the system at first primarily for peripheral tasks and deferring its broader utilization until acceptability is assured.

The copyright laws will present serious difficulties if he wishes to disseminate materials copyrighted by others. Under existing law, it is almost impossible for him to do so without obtaining the prior consent of the copyright owner (invariably the publisher) on whatever terms and conditions the owner impose. Moreover, the proposed copyright revision now pending before Congress

offer the communication system operator little encouragement for the future. If anything, the revision expands the right of the copyright owner with specific exemptions that are unattractive to a technologically modern communications system.

Further study should examine other alternatives to the present and proposed copyright laws. A number of more attractive alternatives have been proposed and preliminarily studied, such as compulsory licensing requirements, creation of a centralized educational licensing authority and the like. These other alternatives should be analyzed and evaluated from the viewpoint of the educational communication system creators.

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4. United States v. Butler, 297 U.S. 1 (1936).
5. Article X, Section 11.
6. Nebraska Revised Statutes, Section 79-214(b)(5).
7. Florida Statutes Annotated, Section 231.09(3).
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